IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 643 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

RAJESH KHEMCHANDBHAI PARMAR

Versus

STATE OF GUJARAT

Appearance:

M/S THAKKAR ASSOC. for Petitioner

Mr. U.R. Bhatt, AGP for Respondents.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 03/04/98

ORAL JUDGEMENT

By this application under Article 226 of the Constitution of India, the petitioner calls in question the legality and validity of the order of detention dated 27th November 1997 passed against him by the Police Commissioner for the city of Ahmedabad invoking his powers under Section 3 of the Gujarat Prevention of Anti-Social Activities Act (for short "the Act"), pursuant to which he is at present kept under detention.

2. Against the petitioner, two complaints came to be

lodged with Naranpura police station. As alleged in the first complaint, on 10th October 1997 at 19.30 hours near Pangalla in Junawadaj Ramtekra, the petitioner along with his compeers caused grievous and simple hurt to the complainant by assaulting and giving sword, stick and pipe blows and thereby committed the offences punishable under Section 307, 324 read with 34 and Section 135 (1) of the Bombay Police Act. What is alleged in second complaint is that on 11th October 1997 between 17.00 hours to 20.00 hours on the road from Usmanpura to I.T. Office the petitioner and his compeers assaulted the son of the complainant and caused him grievous hurt by giving pipe and stick blows and thereby committed the offences punishable under Section 326, 506 (1) read with 114 of I.P.C. and Section 135 (1) Bombay Police Act. Having come to know about these two complaints, the Police Commissioner made detailed inquiry. He then came to know that the petitioner was the tartar and by his such nefarious activities he was terrorising the people. Every one therefore under the fear of violence used to keep his lips tight, and no one was coming forward to lodge the complaint or make the statement. The petitioner also used to ogle seeing the women and girls passing by the road; and if any one challenged him he was brutally beaten, and had to meet with dire consequences. The Police Commissioner then found that petitioner was the head-strong person, i.e., a tartar and a decimator. His activities obstructing the public order were going berserk. The petitioner was required to be held in leash. He therefore thought it fit to have some statements from the public but no one came forward to give the statement. After great persuasion when assurance was given that the particulars disclosing their identity would be kept secret, some of the persons showed their willingness to give statements. On perusal of the statements it was also noticed that the petitioner had become more and more wicked and no member of the public was challenging his act because of the fear of violence. He was often creating chaotic situation. With a view to curb his subversive activities, the Police Commissioner found that stern action was required to be taken and his detention was the only way out because any other actions under general law sounding dull were found to be the futile exercise. In the result, the order in question came to be passed and the petiitoner at present is kept under detention. He has therefore preferred this application challenging the legality and validity of the order.

3. The petitioner has challenged the order in question on several grounds, but at the time of

submissions, his learned advocate tapered off his submissions confining to the only point namely exercise of privilege under Section 9(2) of the Act. According to him, there was no justification to exercise the privilege and suppress the particulars about the witnesses. The petitioner had a right to know the sources of information so that while making the representation he could say whether the particular statement is reliable or not or why the particular statement is made against him. For want of those particulars i.e. the source, the right to make effective representation was jeopardised and therefore the order of detention was arbitrary and illegal. Without application of mind, the Police Commissioner accepted the report in this regard and exercised the privilege which vitiated his subjective satisfaction.

4. In reply to such contention raised, Mr. U.R. Bhatt, the learned AGP submitted that every material placed before him was considered applying mind. The Police Commissioner then found that in the interest of public the particulars about the witnesses were required to be withheld and accordingly were not disclosed which was quite in consonance with the provision of Section 9(2) of the Act. There is therefore no reason to interfere with the order passed on the ground of exercise of privilege. When both have confined to the only point going to the root of the case, I will deal with the same without dwelling upon the other grounds.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those

cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the detaining authority namely the Police Commissioner for the city of Ahmedabad was required to file the affidavit and satisfy the court

that it was in the public interest, mainly to protect the lives of the witnesses, absolutely necessary to withhold the particulars. It is pertinent to note that in this case explanatory affidavit is not filed by the Police Commissioner. When that is so, it should be assumed that without any just cause the particulars are suppressed. As the particulars were not given, naturally the petitioner could not know what defence was available to him, what were the reasons to state against him and whether in fact those witnesses really stated so or whether they were really in existence ? Thus the right to make effective representation is jeopardised. Further for want of explanatory affidavit, it can be said that there was no just cause for being personally satisfied applying mind for non-disclosure of facts, i.e. about exercise of the privilege. It is stated that through another officer the Police Commissioner verified the fact, and entrusting him the task of enquiry; and it seems he without any application of mind accepted the report made by that officer. Thus the personal satisfaction is also vitiated. The privilege exercised is therefore unjust. Consequently the order of detention and continued detention must be held to be arbitrary and illegal.

7. For the aforesaid reasons, this application is requiried to be allowed. It is allowed accordingly. The order of detention dated 27th November 1997 is hereby quashed and set aside. The petitioner is ordered to be set at liberty forthwith if no longer required in any other case. Rule accordingly made absolute.

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(rmr).